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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 BEHROUZ KAZEMI,

11 Plaintiff,

12 v.

13 KATHERINE WERTIN, et al.,

14 Defendants.

CASE NO. C19-1659JLR

ORDER DISMISSING
COMPLAINT FOR LACK OF
SUBJECT MATTER
JURISDICTION

15 **I. INTRODUCTION**

16 Before the court is Defendant United States of America's ("the Government" or
17 "the United States") Federal Rule of Civil Procedure 12(b)(1) motion to dismiss Plaintiff
18 Behrouz Kazemi's complaint for lack of subject matter jurisdiction pursuant to the
19 Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2675. (*See* MTD (Dkt. # 5); *see also*
20 Compl. (Dkt. # 1-1).) Mr. Kazemi did not file a response to the Government's motion.
21 (*See generally* Dkt.) The court has reviewed the motion, relevant portions of the record,

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1 and the applicable law. Being fully advised,¹ the court GRANTS the Government's
2 motion and DISMISSES Mr. Kazemi's complaint WITHOUT PREJUDICE.

3 II. BACKGROUND

4 On or about May 23, 2019, Mr. Kazemi filed a complaint in King County Superior
5 Court. (*See generally* Compl.) In his complaint, Mr. Kazemi alleges that he suffered
6 injuries and incurred damages on May 30, 2016, following a medical appointment with
7 Dr. Katherine Wertin at HealthPoint, which is a federally supported health center. (*See*
8 *generally id.* ¶¶ 6.1-6.7.) Specifically, Mr. Kazemi alleges that he was misdiagnosed
9 with a serious heart condition and prescribed medication. (*See generally id.*) Prior to
10 filing his complaint, Mr. Kazemi did not file an administrative claim with the United
11 States Department of Health and Human Services ("the Department"). (Torres Decl.
12 (Dkt. # 7) ¶¶ 2-4.)

13 On October 16, 2019, the Government removed Mr. Kazemi's complaint to
14 federal court. (*See* Notice of Removal (Dkt. # 1).) The next day, the Government
15 certified that Dr. Wertin and HealthPoint, and its employees, "are federal employees
16 acting within the scope of employment for purposes of coverage under the Federally
17 Supported Health Centers Assistance Act ("FSHCAA"), 42 U.S.C. § 233." (*See* Notice
18 of Sub. (Dkt. # 2) at 1-2; *see also* Torres Decl. ¶¶ 5-6.) Pursuant to that certification, the

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21 ¹ Mr. Kazemi did not file a response to the Government's motion (*see generally* Dkt.),
22 and the Government has not requested oral argument (*see* MTD at 1). The court does not
consider oral argument to be helpful to its disposition of this motion. *See* Local Rules W.D.
Wash. LCR 7(b)(4).

1 Government substituted itself for Healthpoint and Dr. Wertin as the defendant in this
2 action. (*Id.* (citing 28 U.S.C. §§ 2679(b), (d)(1)).)

3 On October 22, 2019, the Government filed its present motion to dismiss for lack
4 of subject matter jurisdiction. (*See* MTD.) Mr. Kazemi failed to respond to the
5 Government’s motion. (*See generally* Dkt.) The court now considers the Government’s
6 motion.

7 **III. ANALYSIS**

8 **A. Standards for a Rule 12(b)(1) Motion to Dismiss**

9 Subject matter jurisdiction is a threshold issue that goes to the court’s power to
10 hear a case. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94-95 (1998). A Rule
11 12(b)(1) motion to dismiss for lack of subject matter jurisdiction may be facial or factual.
12 *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In resolving a
13 facial attack, the challenger asserts that the allegations of the complaint are insufficient
14 on their face to invoke the jurisdiction of the court. *See id.* However, “[i]n resolving a
15 factual attack on jurisdiction, the district court may review evidence beyond the
16 complaint without converting the motion to dismiss into a motion for summary
17 judgment.” *Id.* (citing *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2
18 (9th Cir. 2003)). “Once the moving party has converted the motion to dismiss into a
19 factual motion by presenting affidavits or other evidence properly brought before the
20 court, the party opposing the motion must furnish affidavits or other evidence necessary
21 to satisfy its burden of establishing subject matter jurisdiction.” *Id.* (quoting *Savage*, 343
22 F.3d at 1039 n.2).

1 **B. The Court Lacks Subject Matter Jurisdiction Because Mr. Kazemi Failed to**
2 **File an Administrative Claim**

3 The United States is immune from suit unless it consents to be sued. *United States*
4 *v. Mitchell*, 445 U.S. 535, 538 (1980); *Cato v. United States*, 70 F.3d 1103, 1107 (9th Cir.
5 1995). Any waiver of immunity is strictly construed in favor of the United States.
6 *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33-34 (1992). The FTCA is a limited
7 waiver of sovereign immunity that permits plaintiffs to bring claims against the United
8 States for the “negligent or wrongful act or omission of any employee of the Government
9 while acting within the scope of his office or employment.” 28 U.S.C. § 1346(b)(1).

10 As a jurisdictional prerequisite, an FTCA claim may only be instituted after the
11 Government denies an administrative claim, either actually or constructively by failing to
12 act upon the claim within six months. *See* 28 U.S.C. § 2675(a); *McNeil v. United States*,
13 508 U.S. 106, 113 (1993) (“The FTCA bars claimants from bringing suit in federal court
14 until they have exhausted their administrative remedies.”). “The requirement of an
15 administrative claim is jurisdictional.” *Brady v. United States*, 211 F.3d 499, 502 (9th
16 Cir. 2000). “Because the requirement is jurisdictional, it must be strictly adhered to.
17 This is particularly so since the FTCA waives sovereign immunity.” *Id.* (internal citation
18 and quotation omitted).

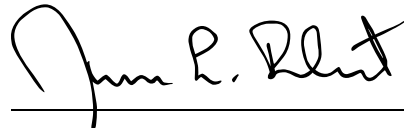
19 The Government provides competent evidence that Mr. Kazemi did not present an
20 administrative claim to the Department prior to filing suit in King County Superior Court.
21 (See Torres Decl. ¶¶ 2-4.) Mr. Kazemi provides no response to the Government’s
22 evidence. (See generally Dkt.) Thus, the court concludes that because Mr. Kazemi did

1 not “first present the claim to” the relevant federal agency and allow the agency to make
2 a final disposition of his claim, he failed to exhaust his administrative remedies as
3 required under 28 U.S.C. § 2675(a). As a result, the United States has not waived its
4 sovereign immunity, and this court lacks subject matter jurisdiction over Mr. Kazemi’s
5 complaint. The court grants the Government’s motion and dismisses Mr. Kazemi’s
6 complaint without prejudice.

7 **IV. CONCLUSION**

8 Based on the foregoing analysis, the court GRANTS the Government’s motion to
9 dismiss Mr. Kazemi’s complaint for lack of subject matter jurisdiction (Dkt. # 5) and
10 DISMISSES his complaint WITHOUT PREJUDICE.

11 Dated this 14th day of January, 2020.

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14 JAMES L. ROBART
15 United States District Judge
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